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Petition

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

DR. MILTON MARGOLES,

Petitioner,

vs.

ALIDA JOHNS and THE JOURNAL COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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312/746-1971

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November 20, 1981

QUESTIONS PRESENTED FOR REVIEW

1. Is a plaintiff deprived of due process of law when the presiding judge, immediately before his ascension to the bench, was counsel for plaintiff's opponent in a companion case raising the same issues of law and fact?

2. Is a federal judge required to recuse himself when he has a patent interest in the outcome of the case as well as personal knowledge of material facts dehors the record?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner seeks a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

Both opinions below are attached hereto in Appendix A. The unreported February 25, 1981, decision and order of the District Court for the Eastern District of Wisconsin have been affirmed and adopted as the September 21, 1981, opinion of the United States Court of Appeals for the Seventh Circuit, which is not yet reported. No petition for rehearing was filed in either court.

JURISDICTION

The judgment of the Court of Appeals in this case was entered on September 21, 1981. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1).

STATUTORY PROVISIONS INVOLVED

-Fed.R.Civ.P. 60 (b);
-Canon 3 (C) of the Code of Judicial Conduct and the virtually identical language as it has been incorporated into amended 28 U.S.C. § 455;
-28 U.S.C. § 144; and
-the 14th Amendment to the United States Constitution.

These provisions are attached hereto in Appendix B.

STATEMENT OF THE CASE

THE FACTUAL BACKGROUND

This is one of two defamation cases filed by Petitioner, Dr. Milton Margoles, in Federal District Court in Wisconsin in the early 1970's. Essentially, primary legal claims and factual allegations in the two cases were the same. Petitioner charged the defendants in each case with maliciously and falsely defaming him regarding (illegal) abortions. In each case, the defendants denied slandering Petitioner, and in this case the defendants asserted an affirmative

defense of truth.

In the first of these two cases, the attorney for the defendants was Robert W. Warren. In the case for which Certiorari is sought here, Robert W. Warren was the district judge.

Warren had put down his advocate's gown in litigation against Petitioner only to immediately pick up his judicial robe to participate in Petitioner's proceedings in a different role. He thus brought to the decision-making function a form of expertise that has been deemed invalid at least since the days of Sir Francis Bacon: a personal interest in the outcome of the case. On October 8, 1974, Warren was counsel opposing Petitioner in a companion defamation case to this one. On October 23, 1974, Warren was sitting in judgment of Petitioner in this case offering some of the same principal issues of fact and law as that in which

Warren had been counsel and even as it was still pending.[1]

Repeatedly, Warren as state Attorney General became personally involved and obtained personal knowledge of the cases in which he was opposing Petitioner. His assistant, LeRoy L. Dalton, made special

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1. Warren as Attorney General of Wisconsin was counsel against Petitioner in two lawsuits: Petitioner's slander and Civil Rights case in Federal District Court for the Western District of Wisconsin (1970-1974), and also in state court, opposing medical licensure for Petitioner. (1969-1970) Warren's position in the license case was that the Doctor was not of good moral character because he allegedly had lied under oath to the state medical board.

Third, Warren opposed and acted to head off federal action on Petitioner's complaint to the Civil Rights Division of the U.S. Justice Dept. (1969-1970) In both Petitioner's complaint and his slander and Civil Rights lawsuit, Warren's assistant, LeRoy L. Dalton, and their clients, officials of the Wisconsin Medical Board, were accused of misconduct virtually identical to that alleged of Defendant Johns in this case--slandering the Doctor about (illegal) abortions and interfering with his application for medical licensure in Illinois. (Pl. Exh. #1, 2, 8)

efforts for Warren to be personally aware of "all aspects" of the Margoles matters and to discuss strategy about them with him. (Pl. Exh. #40) Warren met with his deputy and Dalton in this regard. (e.g., Pl. Exh. #23) Dalton promised to keep the Attorney General informed of any further developments (Pl. Exh. #20), in accordance with which he sent Warren a flow of memoranda and materials about Petitioner. Consequently, Warren in his adversarial roles against the Doctor received knowledge of "facts" intended by Dalton to discredit, in Warren's eyes, Petitioner and Petitioner's position regarding the defamation issue, which was central to both of his federal court cases. (e.g., Pl. Exh. #20, 22-24, 31, 40)

THE PROCEEDINGS IN THE COURTS BELOW

Petitioner attempted to avoid any problems of judicial partiality in the Eastern District of Wisconsin by bringing this diversity case in

Federal District Court in the District of Columbia. Defendants successfully challenged jurisdiction there (*Margoles v. Johns*, 483 F.2d 1212, D.C. Cir., 1973), and Petitioner pursued this case in federal court in Milwaukee.

In June, 1974, Petitioner moved pursuant to 28 U.S.C. § 144 and Canon 3 (C) of the Code of Judicial Conduct that the Hon. John W. Reynolds disqualify himself from this case, foremost because previously as Attorney General of Wisconsin, Reynolds had counselled action against the Doctor's medical license after a 1960 tax conviction.

Later in 1974, then-Atty. Gen. Warren was nominated and confirmed as a Federal District Judge in Milwaukee. Within a period of two weeks, Robert W. Warren switched hats from opposing counsel in Petitioner's slander and Civil Rights lawsuit in the Western District of Wisconsin, to presiding judge in Petitioner's slander case in the Eastern District of

Wisconsin when it was reassigned to him. Because § 144 prohibited Dr. Margoles from formally seeking the disqualification of a second judge,[2] at Judge Warren's first appearance in this case on April 25, 1975, Petitioner expressed concern to Judge Warren about his partiality because of his previous adversarial positions as Attorney General against Petitioner. Judge Warren disclaimed any bias and did not disqualify himself. Petitioner could not appeal this issue because at that time the Seventh Circuit did not allow writs of mandamus or prohibition for judicial disqualification (see *SCA Services, Inc., v. Morgan,* 557 F.2d 110, 117, 7th Cir., 1977), nor for that issue to be raised for the first

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2. See "Disqualification of Judges and Justices in the Federal Courts," 79 *Harvard Law Review* 1435, 1445, 1966. Reported federal cases uniformly have prohibited parties from challenging two successive judges in a case, e.g., *U.S. v. Anderson,* 433 F.2d 856, 859, 8th Cir., 1970; *U.S. v. Hoffa,* 245 F.Supp. 772, 775, E.D.Pa., 1965.

time on appeal. (*Barry v. U.S.*, 528 F.2d 1094, 1100, 7th Cir., 1976)

In 1976, six weeks after Petitioner fully (although tardily because of illness and personal difficulties) had complied with a discovery order, Judge Warren nevertheless dismissed this case upon finding that Petitioner wilfully had disobeyed his order. The Seventh Circuit affirmed. It said it could not substitute its discretion for that of the District Court (and found no abuse of discretion), but added that if it could, "a close question" existed whether some other sanction was "just and appropriate." (*Margoles v. Johns*, 587 F.2d 885, 888-889, 7th Cir., 1978) This Court denied Certiorari (*ibid.*, 430 U.S. 946, 1977)

Despite Petitioner's considerable previous discovery efforts in both cases, it was not until 1979 that the Attorney General's office--in a delinquency far more egregious

than that for which Robert Warren dismissed this case--finally produced additional files on Petitioner in compliance with a 1974 discovery order in the other slander case. (Pl. Exh. #36) These documents provided, for the first time, essentially a full match between the major points of Defendant Alida Johns' slander and the preceding activities of Warren's assistant, Dalton. They also now established a line of substantive communication about Petitioner between Dalton and reporter Johns' newspaper, the *Sentinel*. (Previously, Dalton as well as Mrs. Johns and her editor had denied involvement in or knowledge of any such communication.)

Discovery of these previously withheld materials provided the impetus for Petitioner's Rule 60 (b) motion to set aside the proceedings involving Judge Warren as void or otherwise violating Petitioner's Constitutional right

to a neutral and detached judge.[3] The District Court denied the motion. The Seventh Circuit adopted that decision holding that Judge Warren did not have a duty to disqualify himself. (A-18-19)

REASONS FOR GRANTING THE WRIT

This Court's obligation as overseer of the administration of Justice in the federal courts requires that it assure the adherence of the judges of those courts to the long established Constitutional demands of impartiality.

1. The Seventh Circuit has sanctioned a flagrant violation of federal judicial impartiality, which is irreconcilable with basic concepts of due process.

The record in this case distinctly

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3. According to the issue under the theory of voidness (as distinguished from the theory of error) which was not reviewed prior to this motion: "The question here is not whether the trial judge has abused his discretion, but whether he could exercise any discretion because of a personal extrajudicial bias or prejudice which precludes dispassionate judgment." (*In Re I.B.M.*, 618 F.2d 923, 926, 2d Cir., 1980)

shows repeated personal, extrajudicial contacts and involvement by Robert W. Warren as state Attorney General adversariously against Petitioner on a number of the same issues which are at the heart of this case from which Judge Warren would not recuse himself and then deprived Petitioner of a trial on the merits.

Yet, in the face of a clear case of disqualification, everything that follows by the lower courts here is an evasion of the substantial due process questions raised by Petitioner's motion.

The Seventh Circuit, instead of rendering its own opinion, has adopted the District Court's decision which adroitly avoids mentioning any of the specific threshold facts facts which triggered various disqualification requirements. In so doing, it circumvents addressing how Judge Warren could preside here two weeks after defending his assistant against

Petitioner in litigation which in major respects was a mirror image of this case; or how Judge Warren could impartially judge Petitioner's credibility in denying wilful disobedience of Warren's discovery order after extrajudicially receiving a flow of information intended to discredit Petitioner in Warren's eyes, and after assuming the position in two lawsuits that Petitioner was untruthful and not of good moral character.[4]

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4. The decision also ignores § 144 altogether. It obscures the interaction of multiple disqualification provisions, e.g., the great majority of federal courts which have considered disqualification since the 1974 effective date of amended § 455 in cases such as this filed before then, have conformed to its provisions and standards either directly through amended § 455 or through Canon 3 (C) of the Code or the Due Process Clause. Further, the decision avoids discussing the specific unusual facts and issues in this R. 60 (b) (4) motion because of which res judicata and waiver are inapplicable here. For example, it obfuscates Petitioner's inability to formally challenge Judge Warren as the second judge in this case (*supra*, pp. 6-7) by wrongly indicating that Petitioner actually had filed a disqualification motion against him. (A-19) And the Seventh Circuit fails to consider the alternative "independent action" basis of Petitioner's motion.

Petitioner asked the lower courts to measure the particular threshold facts here by the authoritative analysis of Canon 3 (C) of the Code of Judicial Conduct by the *Harvard Law Review*,[5] widely used by the circuits as an interpretative yardstick for disqualification. Had their decisions done so, **the Constitutional untenability of Petitioner having to meet his adversary as his judge** in this case would have been apparent.

Canon 3 (C) of the Code has been adopted by the American Bar Association, the Judicial Conference of the U.S., and Congress, as the decision recognizes, "to promote public confidence in the judicial system." (A-17) Where, as here, some federal courts will not

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5. "Disqualification of Judges and Justices in the Federal Courts"; 86 *Harvard Law Review* 736, 754-761, 1973; e.g., for personal bias, prejudice, and (extrajudicial) knowledge of disputed evidentiary facts, previous employment as a governmental lawyer, and interest.

forthrightly uphold the requirements of the Code against blatant violations by fellow judges, it becomes appropriate for this Court to exercise its supervisory powers to "prohibit any practice which threatens the judicial process and its integrity." (*Fredonia Broadcasting Corp., Inc. v. RCA Corp.*, 569 F.2d 251, 256-257, 5th Cir., 1978)

2. The Seventh Circuit's decision discards fundamental requirements of judicial impartiality pronounced by this Court and other circuits. It brushes aside the Constitutional implications of Judge Warren's failure to disqualify himself, stating that,

> "a litigant is not denied due process by either the 'appearance' of partiality or by circumstances which might lead one to speculate as to a judge's impartiality." (A-8-9; emphasis added)

The decision concedes that "a litigant is denied the fundamental fairness to which he is Constitutionally entitled if the judge of his case is unfairly biased against him." (A-8)

But it ignores this Court's repeated enouncements that due process requires that "Justice must satisfy the appearance of Justice." (*Offutt v. U.S.*, 348 U.S. 11, 14, 1954; *In Re Murchison*, 349 U.S. 133, 136, 1955) Directly on point, this Court subsequently declared that,

> "any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias."
>
> (*Commonwealth Coatings Corp., v. Continental Casualty Co.*, 393 U.S. 145, 150, 1968; emphasis added)

It has been a cornerstone of American jurisprudence that a litigant, in fact, is treated unfairly and denied due process by the appearance of judicial partiality. The Ninth Circuit has said: "It is a general rule that the appearance of partiality is as dangerous as the fact of it." (*U.S. v. Conforte*, 624 F.2d 869, 881, 1980) Also see the Second Circuit in *In Re I.B.M.* (618 F.2d 923, 932 n. 11, 1980), the Fifth Circuit in

Potashnick v. Port City Construction Co., (609 F.2d 1101, 1111, 1980), and "Disqualification of Federal Judges--Problems & Proposals" (7 *Seton Hall Law Review* 612, 618 n. 28, 1976).

The Seventh Circuit finds amended § 455 (and, therefore, the Code) "largely irrelevant" here because, it says, the statutory requirement of avoiding the appearance of partiality "goes beyond 'due process'" and "is based on considerations over and above Constitutional standards." (A-9) To the contrary,

> "It is the statutory recusal provisions, 28 U.S.C. § 144, 455 which give life to the due process requirements of a 'fair trial (before) a fair tribunal.'" (*U.S. v. I.B.M.*, 475 F. Supp. 1372, 1390, S.D. N.Y., 1979) Similarly, see the Fifth Circuit in *U.S. v. Seiffert* (501 F.2d 974, 978, 1974), and the D.C. Circuit in *U.S. v. Haldeman* (559 F.2d 31, 130 n. 276, 1976)

To allow these misconstructions by the Seventh Circuit to stand is to undermine the mandate of contemporary federal judicial

disqualification requirements and to provide a rationale to other judges to ignore these high standards. To redress its denial of fundamental principles set forth by this Court and other circuits would be a step to reassure the public that federal judicial impartiality will be enforced and credible, and will not become, as conspicuously has happened here, an empty promise.

3. This case exemplifies the need for this Court to review the application of the requirements of the new Code of Judicial Conduct (and amended § 455). In the decade since their adoption, there have been repeated calls for this Court to do so,[6] because

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6. E.g., "Disqualification of Federal Judges--Problems & Proposals"; 7 *Seton Hall Law Review* 612, 638, 1976; "Disqualification of Federal Judges--The Need for Better Guidelines"; 13 *Wake Forest Law Review* 353, 368, 1977. The last time this Court has promulgated standards for federal judicial disqualification (other than for contempt proceedings) was in 1921. (*Berger v. U.S.*, 255 U.S. 22)

in some basic respects, they are seen not to have achieved their intended objective of clarifying the grounds for federal judicial disqualification.[7] Out of such ambiguity recently has emerged public criticism of segments of the federal judiciary for disregarding the Code.

This case provides a fitting opportunity for the Court to offer its guidance to the lower courts on substantive and procedural disqualification requirements and to better delineate the responsibilities of both judges and litigants in this regard.

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7. "Caesar's Wife Revisited--Judicial Disqualification After the 1974 Amendments"; 34 *Washington & Lee Law Review* 1201, 1205-1207, 1977; "Statutory Right to Recusal & the 1974 Amendments to Title 28"; 31 *Southwestern Law Journal* 887, 904, 1977.

CONCLUSION

For the reasons above, we respectfully submit that this is a case of such importance as to warrant the granting of a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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In the

United States Court of Appeals

For the Seventh Circuit

No. 81-1345

DR. MILTON MARGOLES,

Plaintiff-Appellant,

v.

ALIDA JOHNS and THE JOURNAL CORPORATION,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Wisconsin.
No. 72-C-470—Terence T. Evans, *Judge.*

ARGUED MAY 13, 1981—DECIDED SEPTEMBER 21, 1981

Before CUMMINGS, *Chief Judge,* PELL, *Circuit Judge,* and LARSON, *Senior District Judge.**

PER CURIAM. The trial court denied the appellant's Fed. R. Civ. P. 60(b) motion, which sought to vacate a judgment of dismissal.[1] This appeal presents the question whether a trial court judge's considered refusal to recuse himself for alleged partiality, bias, or the appearance thereof, violates a party's right to due

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* Earl R. Larson, Senior District Judge of the District of Minnesota, is sitting by designation.

[1] The original judgment in this case was entered by Judge Robert W. Warren; in light of the nature of this 60(b) attack, the case was transferred to Judge Terence T. Evans for purposes of deciding this motion.

process of law and thereby renders any judgment of the trial court void.

The facts in this matter are fully laid out in the trial court's thorough Decision and Order of February 25, 1981, which is appended below. That decision denied the motion on the ground that the appellant had failed to establish that he had been denied the fundamental fairness to which he is constitutionally entitled.

This action for slander originated in 1972, and was dismissed in 1976 for failure to comply with discovery orders. That judgment of dismissal has already withstood one previous motion to vacate under rule 60(b); an appeal and petition for rehearing to this court, 587 F.2d 885 (7th Cir. 1976); and petitions for certiorari, 430 U.S. 946 (1977), and rehearing, 431 U.S. 926 (1977), in the United States Supreme Court. Although the plaintiff questioned Judge Warren's impartiality at his first appearance before him, that issue was not raised in any of those post-judgment or appeal proceedings. Although that failure creates substantial questions of waiver and res judicata, *see, e.g., Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371 (1940); *Stoll v. Gottlieb*, 305 U.S. 165, 172 (1938); *Kansas City Southern Railway v. Great Lakes Carbon*, 624 F.2d 822 (8th Cir. 1980) (en banc), *cert. denied*, 101 S. Ct. 363, the district court did not deem it necessary to reach those issues. We agree with the trial judge in that respect, and also agree that his Decision and Order of February 25, 1981, reached the proper result for the proper reasons. We therefore adopt that decision, which is attached as Appendix I, as the opinion of this court.

AFFIRMED.

APPENDIX I

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

DR. MILTON MARGOLES,

Plaintiff,

v.

ALIDA JOHNS and THE JOURNAL COMPANY, a corporation,

Defendants.

Civil Action No. 72-C-470

DECISION and ORDER

The complaint in this slander action was originally filed on August 18, 1972. In the action the plaintiff, Dr. Milton Margoles, claimed that Alida Johns, a newspaper reporter for The Journal Company, slandered him during conversations with members of the staff of an Illinois Congressman in the late summer of 1970.

Originally, this case was assigned to Judge John W. Reynolds of this district. In June of 1974, Dr. Margoles moved that Judge Reynolds recuse himself from the case. The principal reason cited in support of the motion was that Dr. Margoles could not receive a fair trial before Judge Reynolds because the judge was the Attorney General of the State of Wisconsin during the early 1960's, a time when questions concerning Margoles' state medical license were under consideration by the Wisconsin Medical Examining Board. Subsequently, prior to a ruling on plaintiff's recusal motion, the case was transferred to Judge Robert W. Warren upon his appointment to this court in 1974. Judge Warren had

served as Attorney General of Wisconsin from 1969 until his appointment to the federal bench.

The first appearance of the parties before Judge Warren occurred on April 25, 1975. At the appearance, Dr. Margoles' attorney asked whether Judge Warren's having been Attorney General would create any question of impartiality. Judge Warren said that he had not had such contact with any Margoles matters as would cause a problem. Dr. Margoles concedes in his brief that the question was raised and considered, stating:

> "[plaintiff's attorney] expressed to Judge Warren Dr. Margoles' concern about, and inquired of Judge Warren about his ability to be impartial to the Plaintiff because of his adversary position as Attorney General to Dr. Margoles. Judge Warren disclaimed any bias and did not disqualify himself." (Plaintiff's Brief, pp. 2-3).

Judge Warren was never asked to consider or resolve any substantive issue in the case. On October 23, 1975, three months prior to the then-scheduled trial date of January 12, 1976, the defendants moved under Rule 37, Fed.R.Civ.P., for an order dismissing the complaint. That motion was based upon the failure of the plaintiff to comply with discovery orders previously entered by Judge Warren in January and April, 1975. On January 5, 1976, the date of the final pretrial conference, Judge Warren heard oral argument on the motion to dismiss, considered and rejected plaintiff's motion for an adjournment of the trial date, and dismissed the case stating:

> "[The Court] has the power in the face of prejudicial and willful failure to produce to utilize some pretty strong sanctions. I feel in this instance that you do have what amounts of willful failure to produce. . . . I think on the other hand the failure to produce, that is the heart of the controversy this morning, is in fact attributable to plaintiff and not to counsel. . . . I think that the defendant has been prejudiced and I think even more than the defendant the Court has been prejudiced, . . . [I] am faced with the plaintiff's attorney standing up here and saying he was pre-

judiced by the failure of his own client to produce the documents.

* * *

"[T]he Court is persuaded that it is one of the unusual cases in which the Court should and does make a specific finding that the failure to produce herein is willful, that it is prejudicial, that the matter sought to be produced is highly relevant and material to the case. . . , and that the failure to produce that and comply with the procedural orders of the Court has been so prejudicial that the sanction called for . . . is appropriate, and the Court does herewith order that the case shall be dismissed. . . ." (Transcript of Proceedings—1/5/76, pp. 42-44).

Judgment of dismissal was entered on January 8, 1976.

Plaintiff moved under Rule 60(b) to vacate the judgment on February 4, 1976. Also on February 4, 1976, Dr. Margoles appealed the judgment of dismissal to the Seventh Circuit. Judge Warren's disclaimer of bias and his decision not to disqualify himself was not raised in the 1976 Rule 60(b) motion or as an issue before the Seventh Circuit.

On March 15, 1976, Judge Warren entered an order denying plaintiff's motion to vacate the judgment of dismissal, stating in part:

"The Court is of the opinion that, as evidenced in the rather lengthy order of dismissal, the facts of this case demonstrate failures to comply with clear and repeated discovery orders on the part of the plaintiff and/or his agents and/or attorneys, all to the substantial prejudice of the defendants and their counsel and the administration of this Court. It seems apparent that these failures were done either willfully or in conscious disregard of this Court's specific decrees; thus there was ample justification for entry of an order of dismissal pursuant to Rule 37(b)(2)(C)."

Dr. Margoles' appeal to the Seventh Circuit met with a similar lack of success. In a decision embracing both the dismissal order and the denial of the Rule 60(b) motion, the Seventh Circuit affirmed Judge Warren. *Margoles v. Johns*, 587 F.2d 885 (7th Cir. 1978).

Plaintiff's subsequent petition to the Seventh Circuit for a rehearing was denied by order of the Seventh Circuit on November 16, 1976.

Apparently undaunted, Dr. Margoles petitioned the United States Supreme Court for a writ of certiorari on February 2, 1977. The petition was denied by an order entered on March 28, 1977. Plaintiff's petition for rehearing by the Supreme Court was also denied on May 16, 1977.

Three years later, almost five years after this case was dismissed by Judge Warren and over five and one-half years after Dr. Margoles first appeared before Judge Warren at the April, 1975 pretrial conference, Dr. Margoles seeks to resurrect this action by bringing a *second* Rule 60(b) motion, claiming that the proceedings before Judge Warren were not consistent with the requirements of due process of law and that the judgment entered against him must be declared void.

In essence, Dr. Margoles claims that Judge Warren should have recused himself from the case. He argues that the failure of Judge Warren to step aside violated the dictates of 28 U.S.C. § 455 (the "disqualification" statute) and the due process clause of the Constitution.

Because of the nature of the pending motion, Judge Warren transferred the case to me. I have accepted it for the purpose of resolving the motion. The parties were notified of the transfer in a letter from Judge Warren on February 5, 1981. Perhaps because I am the only judge in this district who was not old enough to shave when the early events giving rise to Dr. Margoles' problems with the government first were reported, neither side has objected to my exercise of jurisdiction over the matter.

In a flurry of letters received since the transfer, the plaintiff has requested and the defendant has resisted

the scheduling of a hearing on the motion. My practice is to decide motions, except in very unusual cases, on briefs and written submissions. I have considered the issue presented here and concluded that a hearing is not necessary. Thus, the request for a hearing is denied. Both sides have had ample opportunity to submit to the court the materials necessary to resolving the motion at hand. The matter will be resolved based on the submissions in the file.

The question of Judge Warren's alleged legal inability to have heard this case is not being raised on appeal. Dr. Margoles' appeal was heard and denied, and the issue here is not whether Judge Warren erred, although much of plaintiff's argument is directed to that point. Rather, Dr. Margoles is collaterally attacking a judgment that has withstood one previous motion to vacate under Rule 60(b), an appeal to the Seventh Circuit, a requested rehearing before the Seventh Circuit, a certiorari petition to the Supreme Court, and a requested rehearing before the Supreme Court.

In attacking the judgment collaterally, plaintiff is confined to the *only* procedural avenue available to him: Rule 60(b)(4). That rule authorizes the vacation of a judgment if it is found to be "void." To show that the judgment entered on January 8, 1976 is void, plaintiff must show not simply error but that a fundamental due process was *in fact* denied him.

> "A judgment is not void merely because it is or may be erroneous. (citations omitted). For a judgment to be void under Rule 60(b)(4), it must be determined that the rendering court was powerless to enter it. If found at all, voidness usually arises for lack of subject matter jurisdiction or jurisdiction over the parties. It may also arise if the court's action involves a plain usurpation of power or if the court has acted in a manner inconsistent with due process of law. In the interest of finality, the concept of setting aside a judgment on voidness grounds is narrowly restricted." *V.T.A., Inc. v. Airco, Inc.*, 597 F.2d 220 (10th Cir. 1979), at 224-25.

The showing that must be made to attack this judgment is plain:

> "A judgment is not void merely because it is erroneous. It is void only if the court that rendered it lacked jurisdiction . . . or if it acted in a manner inconsistent with due process of law." *C. Wright and A. Miller, Federal Practice and Procedure*, § 2862, pp. 198-200.

A judgment is not void and subject to collateral attack under Rule 60(b)(4) if subsequent decisions prove it erroneous, *Marshall v. Board of Education*, 575 F.2d 417, 420-21 (3rd Cir. 1978), or if it was entered pursuant to a statute later determined to be unconstitutional. *United States v. City of Milwaukee*, 441 F.Supp. 1377, 1379 (E.D. Wis. 1977).

The challenge raised by plaintiff requires that he demonstrate not that there is room to question whether Judge Warren should have recused himself but, rather, that Judge Warren *in fact* was so biased or prejudiced against plaintiff that the proceeding was unfair. He must establish the fact of prejudice over Judge Warren's affirmation that nothing occurred during his tenure as Attorney General that would interfere with his impartial handling of the case. He must also overcome the subsequent affirmation by the Seventh Circuit of the dismissal order upon which the challenged judgment is based.

While I agree with the principle stated in plaintiff's brief that "due process requires that 'a neutral and detached judge' preside over judicial proceedings", the basic contention which appears to permeate the plaintiff's entire argument is that the judgment is voidable upon a showing of the "appearance" of partiality or upon facts which might cause a "reasonable man" to question Judge Warren's impartiality. While such a presentation, if actually supported by the record, might cause a judge to recuse himself under 28 U.S.C. § 455, or justify reversal on appeal of a refusal to, it would not mandate a finding that a judgment, on a collateral attack such as this, should be declared void.

A litigant is denied the fundamental fairness to which he is constitutionally entitled if the judge of his case is unfairly biased against him. However, a litigant is not

denied due process by either the "appearance" of partiality or by circumstances which might lead one to speculate as to a judge's impartiality. A litigant is denied due process if he is *in fact* treated unfairly.

In his brief, Dr. Margoles devotes considerable attention to arguing the applicability of 28 U.S.C. § 455. In trying to equate due process with § 455, however, he misconceives the law that must be applied on this collateral attack. Section 455 goes beyond "due process." Its requirement of avoiding even the appearance of partiality, even though bias or prejudice does not exist, is based on considerations over and above constitutional standards. Because § 455 is not the real issue here, it is largely irrelevant except to the extent that acts forming the basis for a violation of the statute may also violate due process. For these reasons, the § 455 recusal cases cited by Dr. Margoles are not particularly helpful in resolving the motion at hand.

Despite the arguable irrelevancy of plaintiff's § 455 recusal cases, I will discuss them because of the serious nature of his charges. Most of the cases arose on direct appeal or mandamus from a refusal by the judge to disqualify himself. In most of the cases, therefore, mere error was sufficient for reversal. Those few cases in which due process considerations were the basis for reversal involved serious facts supporting a finding of prejudice, not mere speculation and "appearances."

In *Tumey v. Ohio*, 273 U.S. 510 (1927), the Supreme Court held that prohibition law convictions rendered by the Mayor of an Ohio town, while acting as a judge, had to be reversed because the Mayor received a portion of the fees and costs levied by him against the convicted violators. The Mayor had a prejudicial pecuniary interest opposed to the interest of the defendants. Specifically, the Court concluded that,

> "[I]t certainly violates the Fourteenth Amendment, and deprives a defendant in a criminal case of due process of law, to subject his liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case." 273 U.S. at 523.

Offutt v. U.S., 348 U.S. 11 (1954), involved an appeal of a criminal contempt conviction. The Supreme Court in *Offutt* concluded that where a federal district judge had become personally antagonistic toward defense counsel during the course of a trial, the judge's subsequent conviction of the attorney for contempt committed during the trial pursuant to Rule 42(a) of the Federal Rules of Criminal Procedure must be reversed. The court did not cite due process requirements in so holding; rather, it cited its "supervisory authority over the administration of criminal justice in the federal courts."

In *In re Murchison*, 349 U.S. 133 (1955), the Supreme Court did cite the due process clause of the Fourteenth Amendment in holding, as in *Offutt*, that individuals alleged to have been in contempt of court were entitled to a trial before a different judge of the contempt charges. In that case, a Michigan state judge had served as a "one-man grand jury" and later adjudged two witnesses guilty of contempt for events which took place before him in the grand jury proceedings.

But even personal and direct involvement in proceedings creating the grounds for animosity toward a party does not necessarily require recusal and, more importantly, is not a sufficient showing of deprivation of constitutionally guaranteed fairness. In *Ungar v. Sarafite*, 376 U.S. 575 (1964), the court ruled that a witness' challenge, though "disruptive, recalcitrant and disagreeable commentary," was still not "an insulting attack upon the integrity of the judge carrying such potential for bias as to require disqualification." 376 U.S. at 584. In *Ungar*, the witness was adjudged guilty of criminal contempt (for his conduct as a witness) in a post-trial hearing presided over by the judge before whom the contempt occurred at trial. The Supreme Court said that,

> "The characterization of the petitioner's conduct [at the trial] as contemptuous, disorderly, and malingering was at most a declaration of a charge against the petitioner, based on the judge's observations, which, without more, was not a constitu-

tionally disqualifying prejudgment of guilt, . . ." 376 U.S. at 586-87.

The question of a constitutional violation for failure of a trial judge to disqualify himself was discussed in a habeas corpus proceeding by the Seventh Circuit in *Barry v. United States*, 528 F.2d 1094 (7th Cir. 1976), another case cited by Dr. Margoles. There, the court pointed out that:

> "Nor did Judge Bauer's decision to preside at the trial lead to a constitutional violation. The Supreme Court has held that the due process clause prohibits a criminal trial in which the judge 'has a direct, personal, substantial, pecuniary interest in reaching a conclusion against [the defendant] in his case.' (citing *Tumey*) . . . More broadly, the Supreme Court has ruled that '[e]very procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which may lead him not to hold the balance nice, clear and true between the state and the accused, denies the latter due process of law.' (citing *Tumey*) The conflicts of interest present in the cases in which this standard was enunciated were, however, much more extreme than the lack of impartiality suggested here.
>
> "Furthermore, any error was harmless . . . (in part) since the same conclusion (of law) was reached independently by this Court on appeal." 528 F.2d at 1099-1100.

Finally, in *Howell v. Jones*, 516 F.2d 53 (5th Cir. 1975), the appellant complained "that because of ex parte communications between the judge who originally cited him for contempt and the judge who eventually tried him on (the subject) charge, he was denied a trial by an impartial tribunal." The Fifth Circuit Court of Appeals found no constitutional infirmity, pointing out that:

> "The leading cases cited by Howell, (*Ward, In re Murchison, Tumey, supra*), are different from the case *sub judice*. They involved situations where

there was actually some incentive to find one way or the other, *i.e.*, financial considerations (*Ward & Tumey*) or previous participation by the trying judge in the proceedings at which the contempt occurred (*Murchison*). In this case, no such incentive is evident, and the record does not otherwise support Howell's contention that he was denied a trial by an impartial tribunal." *Id.* at 57-58.

None of the cases cited above involve situations in which a Rule 60(b)(4) motion has successfully been used to challenge a judgment on the ground that the judge should have disqualified himself. Indeed, plaintiff cites only one case which has considered a collateral attack based upon a failure to recuse, and that was not pursuant to a Rule 60(b) motion but in response to an "extraordinary petition" which the court declined to further characterize. *Kinnear-Weed Corp. v. Humble Oil & Refining Co.*, 403 F.2d 437, 438 n.1 (5th Cir. 1968).

Plaintiff relies extensively on *Kinnear-Weed* for several propositions. Unfortunately for the plaintiff, his reliance is misplaced. The plaintiff in *Kinnear-Weed* sought, and was ultimately denied [*See* same case reported at 441 F.2d 631 (5th Cir. 1971)], the opportunity to reopen a judgment entered 12 years earlier. The Fifth Circuit, in its 1968 order referenced throughout plaintiff's brief, merely held that the plaintiff's accusations should be heard and determined by the district court. The Court of Appeals was plainly impelled to so hold by the gravity of the charges against a deceased judge, charges which, if true, would not just have required that the trial judge should have disqualified himself, but would have established that he corruptly induced and participated in the proceeds of the settlement of the case.

Because of the gravity of the charges and the need to insure that the administration of justice had in fact been pure, the Court of Appeals ordered a factual hearing. 403 F.2d at 440-41. Had the trial judge in fact been corrupt, the plaintiff would have been entitled, on due process grounds, to have the judgment set aside. The case carries no suggestion that a lesser showing would have entitled the plaintiff to relief.

Because plaintiff has suggested the applicability to this case of the first appellate decision in *Kinnear-Weed*, the defendants have argued the applicability to this case of the second consideration of *Kinnear-Weed* by the Fifth Circuit. In reviewing and affirming the district court's dismissal of plaintiff's petition after the previously mandated hearing, the Court of Appeals rejected as entirely inadequate plaintiff's showing which presented

> "no more than the speculative musings of a losing litigant"

about connections and relations between defendant and the deceased judge which were

> "trivial or insignificant matters that merely furnish springboards for speculation, . . ." 441 F.2d at 634, 636.

I believe the observations of the Fifth Circuit in *Kinnear-Weed II* are equally applicable here. I have carefully reviewed the documentation submitted by Dr. Margoles on the issue at hand and find it far short of the kind of evidence necessary for him to even get a hearing, let alone carry the day. He has tried to sink a battleship with a peashooter. Obviously, he has been unsuccessful.

While this decision could end here, Dr. Margoles' allegations, though they may not merit it, will be further explored. Therefore, I move on and note that even if adherence to the disqualification statute were the requisite test, nothing presented convinces me that Judge Warren acted improperly in not recusing himself from this case.

Under 28 U.S.C. § 455 as it existed prior to December 5, 1974, Judge Warren clearly would not have been required to recuse himself. At that time, § 455 provided as follows:

> "Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it im-

> proper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein."

Under this language, a judge was to disqualify himself in any case in which he (1) "has a substantial interest," (2) "has been of counsel," or (3) "is or has been a material witness." Prior to December 5, 1974, if a judge did not fit within one of the first three categories he was not required to recuse himself unless he met the "subjective" test of category four. The "subjective" test was whether his "relationship to any party" or attorney, in "his opinion," rendered it "improper" that he not sit. As the Harvard Law Review noted in 1973,

> "Rather than asserting, for example, that only an impartial judge should participate in a case, section 455 merely requires disqualification for a few likely *sources* of partiality. Hence, if a judge satisfies himself that his situation does not fall within one of the three mandatory categories as narrowly construed by reviewing courts, and if his conscience does not move him to disqualify himself under the discretionary clause, he may hear the case even if he has, for example, a personal bias against a party." 86 Harv. L. Rev. 736, at 742. (Emphasis supplied)

It is clear that in 1974 Judge Warren did not fit into any of the categories of § 455 which gave rise to mandatory recusal. The first, that of "substantial interest," was limited by existing case law to economic interests. *See, e.g., United States v. Bell*, 351 F.2d 868, 878 (6th Cir. 1965) *cert. denied* 383 U.S. 947 (1966). Dr. Margoles had not alleged that Judge Warren had a financial interest in this slander action against Ms. Johns and The Journal Company.

The second category requiring recusal, that a judge must have been "of counsel" to be disqualified, has been construed literally. "Unless the judge was an attorney for one of the parties in connection with the specific case before him, he would not be regarded as having been 'of counsel.'" 71 Mich. L. Rev. at 550 and cases cited therein at n.55.

The third category, the "material witness" provision, was held to be inapplicable under that section unless the judge was actually called as a witness. *United States v. Re*, 372 F.2d 641 (2nd Cir.), *cert. denied* 388 U.S. 912 (1967).

Turning to the fourth or "subjective" category for disqualification under former § 455, that in which a judge is "so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial . . ," it appears that, even without the "in his opinion" limitation, Judge Warren was not required to recuse himself. Prior to 1974, the phrase "so related to or connected with" was generally construed to refer to a familial or financial relationship. By absence of allegation, I conclude that Judge Warren had neither with either Dr. Margoles, Ms. Johns or The Journal Company. In any event, as discussed above, ". . . disqualification for being 'so related or connected' is generally 'a matter confided to the conscience of the particular judge.'" *Weiss v. Hunna*, 312 F.2d 711, 714 (2nd Cir. 1963). A judge's exercise of his discretion under this "subjective" standard is rarely overturned on appeal, even in instances where a judge held stock in a party prior to trial, *United States Fidelity & Guaranty Company v. Lawrenson*, 34 F.R.D. 121 (D. Md.), *affd.* 334 F.2d 464 (4th Cir.), *cert. denied* 379 U.S. 869 (1964), or where a judge previously worked as a lawyer for a party. *Darlington v. Studebaker-Packard Corp.*, 261 F.2d 903, 906 (7th Cir.), *cert. denied* 359 U.S. 992 (1959).

Even if the issue here were merely a question of error on appeal, I have no difficulty concluding that Judge Warren was not required to disqualify himself under 28 U.S.C. § 455 as it existed prior to December 4, 1974.

After this action was filed § 455 was amended to bring the statutory grounds for disqualification of a judge into conformity with the recently adopted canon of the Code of Judicial Conduct[1] relating to disqualification of judges for bias, prejudice, or conflict of interest. The

[1] Canon 3C of the Code of Judicial Conduct was adopted by the Judicial Conference of the United States in April, 1973.

amendment was effective on December 5, 1974. Dr. Margoles, relying primarily on *Potashnick v. Port City Construction Company*, 609 F.2d 1101 (5th Cir. 1980), argues that he is entitled to the benefit of the amendment on his present motion.

In *Potashnick*, the Fifth Circuit Court of Appeals held that ". . . the amended version of 28 U.S.C. § 455 is applicable to a case filed prior to the December 5, 1974 effective date of the amendment, when the trial of the case does not commence until after the effective date." In reaching this conclusion, however, the court noted that there was "substantial authority to the contrary" and that "[n]either the language of the statute nor the cases discussing it clearly indicate whether the amendments were intended to apply to actions filed but not actually brought to trial prior to December 5, 1974, or only to cases instituted after that date." *Id.*

Notwithstanding the Fifth Circuit's conclusion in *Potashnick*, a majority of courts construing the amendment have reached the conclusion that an action must have been *filed* after December 5, 1974 in order for amended § 455 to apply to disqualification motions. *In re Virginia Electric & Power Company*, 539 F.2d 357, 366 (4th Cir. 1976), *Bradley v. Milliken*, 426 F.Supp. 929, 932 (E.D. Mich. 1977), *U.S. v. Haldeman*, 559 F.2d 31 (D.C. Cir. 1976), *Duplan Corporation v. Deering Milliken, Inc.*, 400 F.Supp. 497, 505 (D. S.C. 1975) and *In re Continental Vending Machine Corp.*, 543 F.2d 986, 995 n.4 (2nd Cir. 1976), all have concluded that the amendment to § 455 is inapplicable to actions commenced prior to December 5, 1974. None of the reported cases considering the issue involved due process challenges under Rule 60(b)(4); instead, all have been appeals or petitions directly from refusals to recuse.

In *In re Virginia Electric and Power Company, supra*, the disqualification issue was sent back to the district court for reconsideration under *un*amended § 455. 539 F.2d at 369. In *In re Continental Vending Machine Corp., supra*, the court held that the district judge was not required to disqualify himself under unamended § 455 but suggested that he might do so in the interest

of avoiding the appearance of impropriety. In the remaining cases, the disqualification issue was decided against the movant.

A review of the cases cited compels me to conclude that the applicable disqualification provisions to be considered, if § 455 were to be considered at all in this proceeding, is the statute that existed when this case commenced and Judge Warren assigned to decide it. Not only has Dr. Margoles failed to show that any of the mandatory requirements of the earlier statute were applicable, he has not overcome the considered and expressed conclusion of Judge Warren that there was nothing in his background or experience which impaired his impartiality in this case.

While this could be another place to conveniently end the discussion, I wish to note that even if recusal, not due process, were the issue, and even if the amendment to § 455 applied, the plaintiff's motion would fail.

The legislative history of Public Law 93-512, which enacted the 1974 revision of § 455, makes clear a major purpose in amending the statute was to promote public confidence in the judicial system. *See* 1974 U.S. Code Cong. & Adm. News at 6352. This purpose is inherent in the substitution of an "appearance of bias" test for the "bias in fact" test which existed under former § 455. Dr. Margoles places heavy reliance on the phrase which requires disqualification of a judge in any proceeding "in which his impartiality might reasonably be questioned."

Dr. Margoles was as aware in 1974 as he is now of whatever facts and circumstances create in his mind an appearance of partiality. He knew that Judge Warren had been the Attorney General of Wisconsin and he knew of the involvement of the office of the Attorney General in matters involving him. Despite this knowledge, he chose not to appeal Judge Warren's refusal to recuse or to even include among his appellate arguments the "appearance" of which he now complains. One conclusion may be that his attorney at the time did not find in the circumstances the same appearance of partiality that plaintiff now urges in support of his motion.

Dr. Margoles maintains that his motion is based upon evidence only recently discovered. An examination of his "evidence," however, demonstrates that nothing of consequence to any issue presented by his motion is either of recent origin or discovery. Of the 43 exhibits submitted, only ten can arguably be claimed to have come to plaintiff's attention after judgment was entered in this case in 1976. I have examined the materials and I conclude that they do not demonstrate any lack of impartiality on the part of Judge Warren.

As Judge Warren himself noted in *Matter of Searches Conducted on March 5, 1980*, 497 F.Supp. 1283 (1980):

> ". . . individuals who become members of the federal bench do not arrive there from some cloistered order. They are perforce persons who have engaged in public affairs, often as politicians or officials from the ranks of the executive branch of government. They are not sterile creatures who don judicial robes without any prior contacts in the community but rather are very likely to be men and women with a broad exposure to all kinds of citizens of all shades of persuasion and background."

As also noted by Judge Warren in *Searches, supra*, at the time he served as Attorney General:

> ". . . the Attorney General's Office had almost 500 employees. The office was responsible for providing legal services and law enforcement services across the state. At any one time, literally thousands of cases were being prosecuted and defended by the Attorney General's Office. Case records were maintained by computers and although each case was brought in the name of the Attorney General, his personal knowledge of an individual case or a prosecution would be only such as would be made known to him in 'justification memos' prior to commencing a lawsuit or in his staff meetings with the various units or in memoranda designed to keep the 'front office' apprised of developments."

While it is true that Judge Warren had some knowledge of Dr. Margoles, nothing included in the

plaintiff's exhibits leads me to conclude that the judge had a duty to disqualify himself from presiding over this slander case. Instead, I have no trouble concluding that he properly exercised his then-existing "duty to sit" by denying the plaintiff's motion. Accordingly, the plaintiff's Rule 60(b) motion is denied.

SO ORDERED at Milwaukee, Wisconsin, this 25 day of February, 1981.

BY THE COURT:

/s/ Terence T. Evans
United States District Judge

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA 4969—Midwest Law Printing Co., Inc., Chicago—9-21-81—350

Per Curiam Opinion
Judgment--Oral Argument
United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604
September 21, 1981

Before

Hon. Walter J. Cummings, Chief Judge
Hon. Wilbur F. Pell, Jr., Circuit Judge
Hon. Earl R. Larson, Senior District Judge*

DR. MILTON MARGOLES, M.D., Plaintiff-Appellant,	) Appeal from the) United States
No. 81-1345 vs.	) District Court) for the Eastern
ALIDA JOHNS and THE JOURNAL COMPANY, a corporation, Defendants-Appellees.	) District of) Wisconsin.) No. 72-C-470) Judge Terence) T. Evans

This cause was heard on the record from the United States District Court for the Eastern District of Wisconsin, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

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*Earl R. Larson, Senior District Judge of the District of Minnesota is sitting by designation.

FED.R.CIV.P. 60: RELIEF FROM JUDGMENT OR ORDER

"(a) CLERICAL MISTAKES. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) MISTAKES; INADVERTENCE; EXCUSABLE NEGLECT; NEWLY DISCOVERED EVIDENCE; FRAUD, ETC. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59 (b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order,

or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28 U.S.C. § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action."

DUE PROCESS CLAUSE OF THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION

"1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

THE CODE OF JUDICIAL CONDUCT

CANON 3 (C): DISQUALIFICATION *

"(1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:

(a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

Commentary: A lawyer in a governmental agency does not necessarily have an association with other lawyers employed by that agency within the meaning of this subsection; a judge formerly employed by a governmental agency, however, should disqualify himself in a proceeding if his impartiality might reasonably be questioned because of such association.

(c) he knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(d) he or his spouse, or a person within the third degree of relationship to either of them, or

the spouse of such a person:

(i) is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) is acting as a lawyer in the proceeding;

Commentary: The fact that a lawyer in a proceeding is affiliated with a law firm with which a lawyer-relative of the judge is affiliated does not of itself disqualify the judge. Under appropriate circumstances, the fact that "his impartiality might reasonably be questioned" under Canon 3 C (1), or that the lawyer-relative is known by the judge to have an interest in the law firm that could be "substantially affected by the outcome of the proceeding" under Canon 3 C (1) (d) (iii) may require his disqualification.

(iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) is to the judge's knowledge likely to be a material witness in the proceeding;

(2) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(3) For the purposes of this section:

(a) the degree of relationship is calculated according to the civil law system:

Commentary: According to the civil law system, the third degree of relationship test would, for example, disqualify the judge if his or his spouse's father, grandfather, uncle, brother, or niece's husband were a party or lawyer in the proceeding, but would not disqualify him if a cousin were a party or lawyer in the proceeding.

(b) 'fiduciary' includes such relationships as executor, administrator, trustee, and guardian;

(c) 'financial interest' means ownership of a legal or equitable interest, however small, or a relationship as director, advisor, or other active participant in the affairs of a party, except that:

(i) ownership in a mutual or common investment fund that holds securities is not a 'financial interest' in such securities unless the judge participates in the management of the fund;

(ii) an office in an educational, religious, charitable, fraternal, or civic organization is not a 'financial interest' in securities held by the organization;

(iii) the proprietary interest of a policy holder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a 'financial interest' in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) ownership of government securities is a 'financial interest' in the issuer only if the

outcome of the proceeding could substantially affect the value of the securities.

D. REMITTAL OF DISQUALIFICATION.

A judge disqualifiifed by the terms of Canon 3 C (l) (c) or Canon 3 C (l) (d) may, instead of withdrawing from the proceeding, disclose on the record the basis of his disqualification. If, based on such disclosure, the parties and lawyers, independently of the judge's participation, all agree in writing that the judge's relationship is immaterial or that his financial interest is insubstantial, the judge is no longer disqualified, and may participate in the proceeding. The agreement, signed by all parties and lawyers, shall be incorporated in the record of the proceeding.

Commentary: This procedure is designed to minimize the chance that a party or lawyer will feel coerced into an agreement. When a party is not immediately available, the judge without violating this section may proceed on the written assurance of the lawyer that his party's consent will be subsequently filed."

*The Code of Judicial Conduct for United States Judges was promulgated by the Judicial Conference of the United States in April, 1973, to be applicable to all federal judges. As the Code applies to the instant case, section D which permitted a remittal of disqualification "was deleted from the Code by the Judicial Conference in March, 1975. Since that date a remittal of disqualification is not permitted under any circumstances." 69 F.R.D. 273, 279. Several years later, the Conference again modified the Code to permit remittal under limited circumstances, consistent with the language of amended 28 U.S.C. § 455.

28 U.S.C. § 144

"Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding. The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith."

(emphasis added)

Opposition

Office - Supreme Court, U.S.
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DEC 21 1981
ALEXANDER L. STEVAS
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No. 81-967

In the Supreme Court of the United States

OCTOBER TERM, 1981

DR. MILTON MARGOLES,

Petitioner,

vs.

ALIDA JOHNS AND THE JOURNAL COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

[The proceeding before the Court, commenced by a Rule 60(b)(4) motion in 1980, is a collateral attack by plaintiff Margoles on a 1976 judgment of dismissal which had been affirmed by the Court of Appeals and as to which this Court had deneid certiorari. 587 F.2d 885 (7th Cir. 1976, pub. 1978), *cert. denied*, 430 U.S. 946 (1977). Margoles seeks to void the judgment on the ground that he had been denied due process because the trial judge did not recuse himself.]

There is no issue for review on certiorari. The only question is:

1. Whether the Court of Appeals erred in affirming the District Court's 1981 finding and ruling (by Judge Evans) that Margoles was not denied due process by District Judge Warren in 1976.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-967

DR. MILTON MARGOLES,

Petitioner,

vs.

ALIDA JOHNS AND THE JOURNAL COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (to which is attached the opinion of the District Court), reported at 660 F.2d 291, is set forth in the appendix to the Petition, pp. A-1 through A-19.

STATEMENT OF THE CASE[1]

Original Case — (1972-1977)

Petitioner Margoles commenced this action in August, 1972 in the Eastern District of Wisconsin. He alleged that Ms. Johns, a newspaper reporter, had slandered him in three telephone conversations with persons in a Congressman's Washington office in late 1970. Respondents denied making any of the statements attributed to Ms. Johns and affirmatively pleaded that the statements she actually made were true. The complaint was dismissed on January 8, 1976 for petitioner's willful failure to comply with discovery orders of the court. Margoles appealed from the judgment and from the District Court's denial of his subsequent Rule 60(b) motion. The Court of Appeals for the Seventh Circuit affirmed both the judgment of dismissal and the denial of the Rule 60(b) motion. 587 F.2d 885 (7th Cir. 1976, published 1978). It also denied petitioner's motion for a rehearing.

This Court denied a petition for writ of certiorari, 430 U.S. 946 (1977), and also denied a petition for rehearing, 431 U.S. 926 (1977).

Case Below (Collateral Attack — 1980-1981)

All appellate avenues having been exhausted, this case ended in 1977 when this Court denied Margoles' petition for certiorari, and his motion for rehearing. Over three

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[1] Petitioner's Statement contains numerous assertions and argumentative conclusions not supported by the record or the decisions below. Respondents therefore submit their summary of the original proceedings in this case (1972-77), and the collateral attack below (1980-81) which led to the current petition. Elsewhere in this brief specific response will be made to the argument in petitioner's Statement.

years later, on July 30, 1980, he filed a second Rule 60(b) motion in the District Court. This time he moved that the 1976 judgment be declared void on the ground that Judge Warren had denied him due process. His principal argument seemed to be that Judge Warren should have recused himself because of what petitioner claims to be an appearance of partiality, and he equated this with denial of due process.

Petitioner Margoles' attack on Judge Warren stems from the fact that Judge Warren was Attorney General of Wisconsin before becoming a federal judge. The Attorney General's office had been adverse to Margoles in two suits.[2] Neither involved the alleged telephone conversations of Ms. Johns in this case. Warren did not personally handle the cases.[3] (*E.g.*, Pl. Ex. 17, 35, 37)

Margoles was well aware in 1974 when Judge Warren was assigned this case that he had been Attorney General. At the first pre-trial conference before Judge Warren in 1975, Margoles' attorney asked Judge Warren whether his having been Attorney General would affect his ability to be impartial. Judge Warren said he had not had such contact with any Margoles matter as would cause any prob-

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[2] Petitioner refers to one as a "companion" case to the one at bar. It was a civil rights and defamation action, brought in the Western District of Wisconsin, and was commenced months before the alleged slander in this case is alleged to have occurred. It was brought against the Wisconsin State Board of Medical Examiners and others (respondents herein were not parties), principally for communications they had made to medical boards in other states. *Margoles* v. *Torney*, 643 F.2d 1292 (7th Cir. 1981).

[3] His lack of involvement is noted further, below.

lem. He disclaimed any bias and did not disqualify himself. (Opinion, A-4.)[4]

Thereafter, throughout the rest of the proceedings in the District Court in 1974-76 and in the two appellate courts in 1976, Margoles said nothing about Judge Warren's sitting in the case, and made no claim that he should have disqualified himself. He first raised the issue in July, 1980, in his current Rule 60(b) motion.

Because of the nature of the Rule 60(b) motion, Judge Warren transferred it to District Judge Evans. Judge Evans addressed each position argued by petitioner. He ". . . carefully reviewed the documentation submitted by Dr. Margoles . . . and [found] it far short of the kind of evidence necessary for him to even get a hearing, let alone carry the day . . . ." (A-13) In response to Margoles' claim that some of his evidence of Judge Warren's involvement was only recently discovered, he said:

> An examination of his 'evidence,' however, demonstrates that nothing of consequence to any issue presented by his motion is either of recent origin or discovery. Of the 43 exhibits submitted, only ten can arguably be claimed to have come to plaintiff's attention after judgment was entered in this case in 1976. I have examined the materials and I conclude that they do not demonstrate any lack of impartiality on the part of Judge Warren. (A-18)

After ruling that there was no showing of partiality or deprivation of constitutional rights which would require or permit voiding of the judgment, Judge Evans also ex-

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[4] Margoles had earlier moved to disqualify Judge Reynolds, who had previously been Attorney General. Judge Reynolds did not rule on that motion. When Judge Warren took the bench, he was assigned the case, and the motion against Judge Reynolds became moot.

amined the evidence on a point not necessary to the decision. He found that even if, instead of the due process issue raised by collateral attack, the issue of recusal were being initially and directly examined, Judge Warren had no duty, under the facts here, to recuse himself under the federal recusal statute, 28 U.S.C. § 455, either in its amended or pre-amendment form. (A13-19)

The Court of Appeals affirmed the District Court's denial of the Rule 60(b) motion and adopted the District Court's decision as its opinion. (A-2)

REASONS WHY THE WRIT SHOULD BE DENIED

This case presents no issue warranting review by this Court on certiorari. The Court is being asked to re-examine facts which petitioner belatedly asserts demonstrate the personal bias of a federal judge but which the two courts below have examined and found to be inconsequential, as did District Judge Warren at the outset. Judge Evans, after careful review of Margoles' evidence, correctly characterized petitioner's evidence as an attempt "to sink a battleship with a peashooter." (A-13)

The decision below is manifestly correct. The issue in a collateral attack brought on the grounds urged by petitioner is whether he was in fact denied due process so as to void the judgment. The decisions below applied clear principles of law to the questions raised and correctly determined that petitioner's concerns were factually baseless. There is no conflict of decisions on any issue presented by this case, and it presents no important question of law requiring decision by this Court.

I.

THE COURTS BELOW FULLY CONSIDERED AND CORRECTLY DECIDED THE ISSUE

The courts below correctly determined that the issue to be resolved was whether Margoles had in fact been denied due process. They found no evidence of such a denial. Then, although the courts below disagreed with Margoles' argument that a violation of the recusal statute, 28 U.S.C. § 455, or the mere appearance of partiality was sufficient to set aside the 1976 judgment, they nonetheless also ex-

amined Margoles' evidence and considered his arguments as if the issue were simply whether Judge Warren should have recused himself under the recusal statute. They concluded there was no evidence to satisfy even that minimum standard.

A. The Issues Were Fully Considered

Rule 60(b)(4) authorizes the vacation of *void* judgments. As the courts below correctly observed (A-7), to show that the judgment entered in this case on January 8, 1976 was void, petitioner was required to show not simply error by Judge Warren in declining to recuse himself but that petitioner's constitutional right to due process was in fact denied him in the proceeding. In the interests of finality of judgments, the voiding of judgments must be narrowly restricted. *V.T.A., Inc.* v. *Airco, Inc.*, 597 F.2d 220, 224-25 (10th Cir. 1979).

The cases relied upon by petitioner for the proposition that the mere "appearance" of bias is a sufficient basis to belatedly invalidate a judgment (Petition, pp. 14-16) stand for nothing of the sort. They hold only that judicial error in applying the standards of the federal recusal statute may be reviewed and corrected on appeal or upon direct review of that action. *E.g., Offutt* v. *United States*, 348 U.S. 11 (1954); *In re Murchison*, 349 U.S. 133 (1955). *United States* v. *Conforte*, 624 F.2d 869 (9th Cir. 1980), not only did not consider due process standards at all but affirmed the decision below not to recuse. While "appearances", if actually supported by the record (and they are *not* here), might well require a judge to recuse himself under 28 U.S.C. § 455, or justify reversal on appeal of a refusal to do so, mere "appearances" are wholly inadequate as a basis for voiding a judgment. A litigant is denied due process only if he is in fact denied due process.

The courts below, although correctly of the view that due process was the test, nevertheless also considered § 455 both as amended in 1974 and in its prior form, and found that Judge Warren had satisfied both versions of the statute. [Petitioner criticizes the Court's not having mentioned § 144 (Petition, p. 12, n. 4) or the Code of Judicial Conduct. (Petition, p. 13) The standards of both are of course covered by § 455 (amended).]

A claim of bias insufficient under § 455 is necessarily insufficient as a claim of denial of due process. *In re I.B.M.*, 618 F.2d 923, 932 n.11 (2d Cir. 1980). Indeed, if either Congress in enacting the 1974 amendment to § 455, or the federal courts in interpreting that amendment, had considered it coterminous with constitutional requirements, the amended statute would hardly have been enacted, and interpreted, to apply only to cases instituted after December 5, 1974. *See, e.g., In re Virginia Electric & Power Co.*, 539 F.2d 357, 366 (4th Cir. 1976).

The District Court found Judge Warren "clearly would not have been required to recuse himself" under § 455 as it existed prior to amendment in 1974. (A-13) Even after applying the more stringent standards of the statute as amended to add an "appearance of bias" test, the district court found that petitioner's showing here simply did not "demonstrate any lack of impartiality on the part of Judge Warren." (A-18) The court appropriately noted that the history of this case suggested that petitioner's "attorney at the time [prior to substitution of petitioner's son as attorney] did not find in the circumstances the same appearance of partiality that plaintiff now urges in support of his motion." (A-17)

Far from sanctioning a violation of judicial impartiality, as petitioner suggests (Petition, p. 14), the courts below studiously examined petitioner's "evidence" against every

element of the recusal statute, in both its pre- and post-amendment forms, even though the standards imposed by the statute are, for the purpose of advancing public confidence in the judicial system, considerably more stringent than required by the due process clause.

B. The Issues Were Correctly Decided

Petitioner's contention that Judge Warren "was counsel for plaintiff's opponent in a companion case" and held "a patent interest in the outcome of the case as well as personal knowledge of material facts" about the case, the assertions upon which Margoles premises his Questions Presented (Petition, p. i), are not supported in the record, and the courts below were manifestly correct in so holding. The "companion" case described by petitioner was in fact unrelated litigation commenced earlier in another district against different parties. *See, Margoles* v. *Tormey, supra.* The only point in common between the two cases is that in each case Margoles alleged a defendant had charged him with having performed abortions. [That was one of three alleged slanders in his suit against the respondents and but one of many allegations, including civil rights allegations, in his suit against the Board of Medical Examiners. (Pl. Ex. 1, 2)] The alleged slanders in the two cases were separated in time, were by and to different people, and obviously involved different witnesses and different proofs. But even more important here, except for being the nominal "attorney of record," Judge Warren as Attorney General had no involvement in the civil rights suit.

The "evidence" offered by petitioner for his contention that Judge Warren served in an adversarial capacity in the "civil rights" lawsuit was the appearance of the Attorney General's name on a pleading. (Pl. Ex. 37) However,

that pleading, as well as all other pleadings and transcripts from that case in the record below, established that all personal appearances in the "civil rights" case were made and all pleadings prepared by an Asssitant Attorney General, not the Attorney General. (*E.g.*, Pl. Ex. 17, p. 1; Pl. Ex. 35, p. 1)

Moreover, the "extra-judicial facts" which petitioner claims Judge Warren had knowledge of were a matter of public record.

Margoles himself told the public, in his complaint filed in his Western District case in June, 1970, that he had been accused by the Medical Examiners of performing abortions. (Pl. Ex. 2)

The record below (Pl. Ex. 20) established only that Judge Warren's "knowledge" of this "fact" about abortions was thirdhand and, at most, was knowledge merely of the testimony of one witness during a public proceeding years earlier before the Wisconsin Medical Examining Board. This was public "knowledge".

Petitioner suggests that Judge Warren might have had some negative information regarding petitioner's credibility. (A-12) The Court below did not find any evidence supporting that claim. In any event, such negative information regarding petitioner's credibility was a well-publicized matter of public record in Wisconsin prior to this suit, including an opinion of the Wisconsin Supreme Court. In *Margoles* v. *Wisconsin State Board of Medical Examiners*, 47 Wis. 2d 499, 177 N.W.2d 353 (1970), that court, in affirming the Board's denial of medical license reinstatement, confirmed as supported by "substantial evidence," *id.* at 514, the Board's findings that Margoles' credibility had been impeached and that he intentionally had misled the Board.

Petitioner's contention (Petition, p. 9) that a "line of substantive communication" existed between the Attorney General's office and the respondent newspaper was equally meritless. The "evidence" offered by petitioner to support that contention consisted of memos of two telephone conversations in the period 1968-1970 between an assistant attorney general and reporters other than Ms. Johns employed by respondent corporation (Pl. Ex. 14, 43) and the presence of a draft wire story favorable to Margoles in both Ms. Johns' file and the files of the Attorney General's staff. (Pl. Ex. 12, 13)

The record here demonstrated, as the courts below recognized, that what petitioner claims was a "flow of memoranda and materials" about petitioner (Petition, p. 5) was actually a few minor communications involving inconsequential matters irrelevant to this case. (Pl. Ex. 20, 22, 26, 31) The alleged "heading off" of federal action on a complaint by Margoles (Petition, p. 4) was nothing more than the making of state records on the licensure question available to federal authorities. (Pl. Ex. 22, 23).

In short, petitioner has tried, belatedly, to stretch some inconsequential facts into a denial of due process. The courts below carefully reviewed his facts, and the law, and found that he had proved nothing on either his due process claim, or even on the non-constitutional recusal issues.

As the District Court said, ". . . Judge Warren had some knowledge of Dr. Margoles, [but] nothing included in the plaintiff's exhibits leads me to conclude that the judge had a duty to disqualify himself . . . ." (A-18-19) What petitioner claims Judge Warren knew about Dr. Margoles was a matter of public record.

II.

THIS CASE PRESENTS NO IMPORTANT FEDERAL QUESTIONS

There is no issue of consequence or uncertainty presented by this case. Neither is there any question of importance to anyone beyond the immediate litigants. Plainly, the case does not involve issues likely to be repeated in future litigation. This case is unique. The fact issues here were resolved by the courts below in favor of respondents even assuming interpretations of the law most favorable to petitioner.

Petitioner strains to find a significant issue of federal law in this case. He suggests this case presents an opportunity for the Court to "review the application of the requirements of the new Code of Judicial Conduct (and amended § 455)." (Petition, p. 17) This case does not present that issue.

In the first place, the recusal decision of Judge Warren in the procedural posture of this case properly is to be examined against the due process requirements of the Constitution, not the Code of Judicial Conduct. See page 7, *supra*.

Secondly, even if the recusal statute were considered an appropriate benchmark against which to assess petitioner's collateral attack, it was correctly held below that the applicable statute would be § 455 in its pre-amendment form. (A-16 and cases cited.) Thus this case would not afford an opportunity to address any issue related to the current recusal statute.

Finally, this case presents no difficult or uncertain interpretation of even the amended § 455. Judge Warren's compliance with the recusal statute, as amended, was clear

to the courts below. (A-17-19) This case does not rise to the stature of those significant, generally important or troublesome cases requiring the supervisory intervention of this Court.

The only legal issue of any interest in this case, raised by respondents below, was whether Margoles had any right to be heard at all on his current 60(b) motion. He was fully aware of his claim in 1975, (indeed, raised it with the District Judge), but never raised the issue in his original 60(b) motion or on his subsequent appeal.[5] As the Court of Appeals noted, this failure created substantial questions of waiver and res judicata (A-2), but it was unnecessary for the courts below to consider these issues because the factual findings, on the merits, required denial of the motion to vacate.

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[5] Margoles' contentions that he could not formally challenge Judge Warren (Petition, p. 7) because of § 144, and that he was unable to obtain appellate review of Judge Warren's not recusing himself (Petition, pp. 7-8) are plainly wrong.

The authorities cited (Petition, p. 7, n.2) merely show that only one *incontestable* affidavit may be filed. Other procedures are available. *E.g., United States* v. *Sciuto*, 531 F.2d 842 (7th Cir. 1976); *SCA Services, Inc.* v. *Morgan*, 557 F.2d 110 (7th Cir. 1977). Likewise, Margoles could have sought relief in the Court of Appeals, *e.g., In re I.B.M.*, 618 F.2d 923 (2d Cir. 1980); *In re Virginia Electric & Power Co.*, 539 F.2d 357 (4th Cir. 1976), and clearly had the right to incorporate his claim in his appeal from the judgment. *E.g., Roberts* v. *Bailar*, 625 F.2d 125 (6th Cir. 1980).

CONCLUSION

For the foregoing reasons, respondents respectfully submit that the Petition for a writ of certiorari should be denied.

Respectfully submitted,

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December 21, 1981

Petitioner's Reply Brief

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No. 81-967

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

DR. MILTON MARGOLES,

Petitioner,

vs.

ALIDA JOHNS and THE JOURNAL COMPANY,

Respondents.

PETITIONER'S REPLY BRIEF

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THIS CASE PRESENTS IMPORTANT CONSTITUTIONAL ISSUES

Respondents would have this Court accept as inconsequential the sanctioning by the lower courts of a party having to meet his adversary as his judge.

Respondents also ask this Court to let stand the principle espoused by the Seventh Circuit that the appearance of judicial partiality does not violate due process. They cite no authority which would support this position, because there is none.

These holdings are so repugnant to fundamental requirements of judicial impartiality as to warrant the exercise of this Court's supervisory powers either through plenary review or summary action vacating the judgments below. As expressed by the Fifth Circuit:

> "The protection of the integrity and dignity of the judicial process from any hint or appearance of bias is the

palladium of our judicial system."

(*Potashnick v. Port City Construction Co.*, 609 F.2d 1101, 1111, 5th Cir., 1980)

This case brings to this Court a recurrent ethical issue in the federal courts: under what circumstances should judges who come to the bench after serving as governmental lawyers, disqualify themselves when they are assigned cases involving parties and issues with which they had dealt in their previous positions?

This problem which is the focal point of this petition, occurs with sufficient frequency in the federal courts that it was specifically addressed by Congress in adopting the Code of Judicial Conduct in 1974. (Wright, Miller & Cooper, *Federal Practice and Procedure;* "Jurisdiction," § 3544, p. 356; 1975) When Respondents say that this case "does not involve issues likely to be repeated in future litigation," (R. Br.,

p. 12) they know better. They themselves cited to the Court of Appeals another, highly publicized case in which this year the same Federal District Judge denied a disqualification motion filed because as state Attorney General he had opposed the parties in other lawsuits. (*Matter of Searches Conducted on March 5, 1980*, 497 F.Supp. 1283, E.D.Wis., 1980. The disqualification question in the ensuing case is on appeal.)

This case exemplifies the problem in a striking way: Petitioner brought the one disqualification motion allowed him, only to find that his case then was transferred from one former state Attorney General to another former state Attorney General who more recently and personally than the first judge, had been opposing counsel against Petitioner in other litigation.

THE COURTS BELOW DID NOT FULLY CONSIDER THE ISSUES, AND INCORRECTLY DECIDED THEM

Whether the refusal of Judge Warren to withdraw from this case denied Petitioner due process was neither fully considered nor correctly decided by the Seventh Circuit or the District Court.

The lower courts' statement about Warren's general lack of involvement in thousands of other cases pending in the Attorney General's office (A-18) sidesteps Petitioner's presentation of specific exhibits and facts documenting Atty. Gen. Warren's repeated personal involvement in Petitioner's cases.

Notwithstanding Respondents' claim that the lower courts "studiously" examined Petitioner's evidence against "every element"of the recusal statutes (R. Br., pp. 8-9) and "addressed each position argued by Petitioner," (R. Br., p. 4) in actuality their decision nowhere even mentions the specific facts of

Judge Warren's previous involvements as Attorney General against Petitioner. From the opinion, one would not know that they were opponents in several lawsuits, nor of the common primary issues, nor of the nature or degree of Warren's participation.

Both the decision and Respondents' brief avoid discussing and reconciling their position with the respective provisions of the Code (and amended § 455) as interpreted and applied by the widely utilized analysis by the *Harvard Law Review*.[1] In ignoring these authorities, Respondents misallege that Judge Warren need not have disqualified himself because he did not handle the court work as opposing counsel against Petitioner in the two other lawsuits. (R. Br., p. 10) The determinative facts under the Code are whether Atty. Gen. Warren had any actual personal

1. 86 *Harvard Law Review* 736, 1973; "Disqualification of Judges and Justices in the Federal Courts" (Petition, p. 13)

contact with respect to Dr. Margoles or any of the issues involved in this case (*Harvard Law Review, op. cit.*, p. 761)--not whether Warren's extrajudicial involvements occurred at a supervisory rather than at a courtroom level.

At best, the lower courts did a cursory review of the application here of the requirements of the Code as incorporated into amended § 455. (A-17-19) They did so incorrectly. They, like Respondents, omit that Petitioner's motion is based on actual bias and prejudice by Judge Warren as well as their appearance. (A-8, 17; R. Br., pp. 3, 7) They then proceed to claim that the due process requirements of the Constitution can be differentiated from those of the Code. (A-9; R. Br., p. 12) Their dichotomy is specious:

> "...Supreme Court opinions...have held that the appearance of impartiality is a component of due process, suggesting that disqualification procedures which do not meet this standard are constitutionally offensive."

(45 *Fordham Law Review* 139, 157, 1976; "Disqualification of Federal Judges For Bias Under 28 U.S.C. Section 144 and Revised Section 455"; See Petition, p. 16)[2]

Nor are disqualification standards to be selectively applied or ignored, which follows from Respondents' argument that this case does not afford an opportunity for this Court to address issues related to the

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2. The opinion of the lower courts tailors its discussion of a succession of decisions by this Court as narrowly as possible to avoid mentioning the principle set forth again and again by this Court: that due process requires judicial impartiality both in fact and in appearance. (A-9-10; cf: *In Re Murchison*, 349 U.S. 133, 136, 1955) Respondents attempt to justify the Seventh Circuit's disregard of the applicability here of this principle, by misrepresenting that *Murchison* and *Offutt v. U.S.* (348 U.S. 11, 1954) concern only appellate review of the federal recusal statute. (R. Br., p. 7) In fact, *Murchison* was a state case (see A-10), and neither case involved federal recusal statutes.

So, too, do the lower courts and Respondents attempt to unduly narrow due process considerations to review of this case, by failing to say that the motion is an independent action under Fed.R.Civ.P. 60 (b) as well as under R. 60 (b) (4) for voidness. (A-7; R. Br., p. 7) See *Compton v. Alton Steamship Co., Inc.* (608 F.2d 96, 102-103, 4th Cir., 1979)

current recusal statute. (R. Br., p. 12; like the lower courts, Respondents overlook § 144.) Both lower courts "reviewed" this case under amended § 455 as well as its predecessor. (A-17-19) Moreover, when Petitioner brought his disqualification motion against the first judge in this case pursuant to the Code and § 144, (Petition, p. 6) Respondents opposed the motion, but did not challenge the applicability of the Code. It would be incongruous, as Respondents would have it, for the Code to apply to Judge Reynolds in this case in June, 1974, but not to Judge Warren in this case in April, 1975!

JUDGE WARREN AS STATE ATTORNEY GENERAL HAD REPEATED PERSONAL CONTACT WITH LITIGATION AGAINST PETITIONER, INVOLVING A VIRTUAL IDENTITY OF ACTION AGAINST PETITIONER BY WARREN'S ASSISTANT AND DEFENDANT ALIDA JOHNS IN THIS CASE

Where the decision of the lower courts simply ignores the threshold facts which

required Judge Warren to disqualify himself from this case, Respondents misstate to this Court that "the only point in common" between this case and Petitioner's companion slander and Civil Rights lawsuit in which Warren was opposing counsel, was that they both alleged abortion defamation. (R. Br., p. 9)

Not only did the other case involve the same plaintiff and a number of the same primary issues.[3] So identical were the actions against Petitioner both by Warren's assistant, LeRoy L. Dalton--which formed part of the basis of the companion lawsuit--and by Defendant Alida Johns--which led to this case--that to all appearances, Mrs. Johns picked up where Dalton left off in a smear campaign against Petitioner. (See

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3. As the foremost issue in both cases, malicious and false abortion defamation was specifically alleged in all three counts of the complaint in this case (Pl. Exh. #1) and in all three causes of action in the slander and Civil Rights case. (Pl. Exh. #2, par. #12, 19, and 22-26)

Motion, App. Doc. #36, pp. 5-7.)

The motion at issue here followed the belated production in late 1979 of files from the Attorney General's office which for the first time established a virtual congruence between the activities of Warren's assistant and those of Mrs. Johns against Petitioner. (Petition, pp. 8-9)[4] Indeed, there now was a full match of four of five of Mrs. Johns' substantive statements, and three of these four items are known by

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4. The compelling policy considerations involved in a Rule 60 (b) motion concerning newly discovered evidence with respect to judicial impartiality, have been described in *Kinnear-Weed Corporation v. Humble Oil & Refining Co.* (403 F.2d 437, 439-440, 5th Cir., 1968) Dr. Margoles did not have a full and fair opportunity to raise this issue in 1975-1976, additionally, because of the procedural restrictions discussed in the Petition. (p. 7) None of the cases cited in this regard by Respondents (R. Br., p. 13 n. 5) involved the challenge of a second judge in a case (In accordance with the explicit prohibition of § 144, (b-7) no reported federal case has allowed a party to seek to disqualify a second judge.)or bears on the prescribed limitations of appellate procedure in the Seventh Circuit, governing this case in 1975-1976.

Petitioner to have been raised nowhere else except by Mrs. Johns and involving Dalton. (See Motion, App. Doc. #36, pp. 7-10.)

Respondents' characterization of Judge Warren as merely the "nominal 'attorney of record,'" (R. Br., p. 9) like the lower courts' decision, skirts how his repeated personal contacts and involvement as opposing counsel against Petitioner triggered multiple disqualification requirements that he withdraw from this case.

For example, in direct contravention of prohibitions of the Code and amended § 455 against a judge having extrajudicial knowledge of "disputed evidentiary facts": Respondents claimed an affirmative defense of truth as to the abortion slander, and Dalton sent "facts" to Warren that Petitioner had been involved in an (illegal) abortion. (Pl. Exh. #20) As Respondents admit, Warren thereby gained "thirdhand" knowledge about this disputed

material fact. (R. Br., p. 10)

Warren received this "information," not as a member of the public, but as a partisan report from an assistant defending his actions against Petitioner. Warren was not given exculpatory evidence Dalton and the medical board had on the "incident." (As to why such extrajudicial contact with disputed material issues is impermissible, see *Harvard Law Review, op. cit.*, pp. 757, 759-760.)

Judge Warren's impartiality was further compromised when as opposing counsel in the companion slander case, and with knowledge that Dalton was disseminating "information" that Petitioner had been involved in an (illegal) abortion, (Pl. Exh. #20), Warren wrote a letter expressing his opinion that his assistant was acting in good faith (Pl. Exh. #32)--for doing the same thing against Petitioner which is at issue in this case!

Respondents turn upside down the point

that Robert Warren could not impartially judge Petitioner's credibility in denying wilful disobedience of the discovery order--upon which determination Warren extinguished Petitioner's case--after having taken the position in two other lawsuits that Petitioner was not credible and not of good moral character. (Petition, p. 12) They suggest that Warren's knowledge as to Petitioner's credibility followed from a state court opinion which, they say, was a "well-publicized matter of public record." (R. Br., p. 10) Their position fails in its circuity, because that opinion, in fact, adopted Warren's argument to that court as opposing counsel against Petitioner in other litigation. (Petition, p. 4) It was in connection with both that and the companion slander lawsuits that Dalton repeatedly was sending information to Warren to convince him that Petitioner was not credible. (e.g., Pl. Exh. #20, 22, 23, 31, 40)

CONCLUSION

Congress adopted the Code of Judicial Conduct in the conviction that "litigants ought not have to face a judge where there is a reasonable question of impartiality." (H.Rep.No. 93-1453, 1974, *U.S. Code Cong. & Admn. News*, pp. 6351, 6354-6355)

Petitioner prays that this Court will grant Certiorari in this case because the most essential requirements of due process become meaningless in the absence of judicial impartiality, and because his constitutional right to a neutral and detached judge should not be allowed to become the shell game which the lower courts have made of it.

Respectfully submitted,

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